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The Referendum Debate, the Democratic Deficit and the Governance of Scotland

Alan Page

A casual observer of the referendum debate might have been forgiven for thinking that what mattered most was whether Scotland would be financially better or worse off as an independent country, with one side claiming that Scotland could be as much as £5 billion a year better off within 15 years of independence,¹ and the other that it would benefit from a “UK Dividend” of £1,400 per person per year were it to remain part of the United Kingdom.² The casual observer might well have been right, but as was observed on the setting up of the Royal Commission on the Constitution in 1969, in response to the upsurge in support for nationalist parties in Scotland and Wales, “more is involved in the constitutional development of Scotland, or indeed of any country, than the most convenient economic and fiscal arrangements. More is at stake than an efficient reorganisation of local government.”³ There is also the question of what today is commonly referred to as “governance”, an effective system of which, within a constitutional democracy, requires a balance between “the ability to conduct the business of government effectively and the limitation of the executive power of government in order to avoid abuse of power or loss of democratic consent.”⁴

Had Scotland voted Yes in September 2014, the SNP government's intention was that the Scottish Parliament elected in May 2016 should be required to establish a constitutional

¹ Scottish Government, *Outlook for Scotland's Public Finances and the Opportunities of Independence* (May 2014) p 48.

² HM Treasury, *Scotland Analysis: Fiscal policy and sustainability* (Cm 8854 2014).

³ A W Bradley, “Some Constitutional Aspects of Scottish Development” in J N Wolfe (ed), *Government and Nationalism in Scotland: An Enquiry by Members of the University of Edinburgh* (EUP 1969) 41.

⁴ Sir John Elvidge, “Governance and the Institutional Framework” in Andrew Goudie (ed), *Scotland's Future: The Economics of Constitutional Change* (DUP 2013) 268; other desired characteristics of an effective system of governance, identified by Elvidge, include clarity of accountability and of responsibilities, and a balance between representativeness of society and the availability of high levels of expertise in the matters with which government is concerned.

convention to prepare a permanent written constitution for Scotland.⁵ A written constitution would distinguish an independent Scotland from the United Kingdom which, it was said, was the only country in the European Union, and the only country in the Commonwealth, which did not have a written constitution or Constitution Act.⁶ In the meantime, the Scottish Independence Act 2015, an Act of the Scottish Parliament, would have put in place an “interim constitution”, which together with a “refreshed” Scotland Act would provide the basis for the governance of Scotland until such time as a written constitution was agreed “by or on behalf of the people of Scotland”.⁷

Scotland’s written constitution featured to a certain extent in the referendum debate, not least as an opportunity to remind voters of those aspects of the governance of the United Kingdom to which the SNP government was opposed – the presence of nuclear weapons on the Clyde, cuts in welfare spending, and the “illegal” invasion of Iraq amongst others.⁸ The governance of Scotland under the devolution settlement, or as it would have been between independence and the written constitution, by contrast, featured hardly at all. As one commentator remarked of the former, “the campaign was conducted without any close examination of the record of the devolved parliament or of the quality of its elected representatives; it was almost as if Scotland had no devolved powers or that it had never used them.”⁹ This chapter examines the governance of Scotland as it would have been, had the Scottish government’s proposals been implemented, in the interval between independence and the written constitution coming into force. Before doing so it recalls the main features of the governance of Scotland under the devolution settlement. It concludes by outlining some of the respects in which the governance

⁵ Scottish Government, *Scotland’s Future: Your Guide to an Independent Scotland* (November 2013) p 332; Scottish Government, *The Scottish Independence Bill: A Consultation on an Interim Constitution for Scotland* (June 2014) s 33.

⁶ Alex Salmond, “The People’s Constitution”, speech in Campbeltown, 28 August 2013.

⁷ *The Scottish Independence Bill* (n 5) s 4(1).

⁸ Alex Salmond, speech to the Foreign Press Association, 16 January 2013.

⁹ Kenneth Roy, *The Invisible Spirit: A Life of Post-War Scotland 1945-75* (2nd edn, Birlinn 2014) 518.

of Scotland may change, and the challenges it faces, following enactment of the Scotland Bill currently before the UK Parliament at Westminster.

The devolution settlement

The devolution settlement is based on the Scotland Act 1998, which established the Scottish Parliament and Scottish Government and defined the limits to their powers. The Scottish Parliament is elected by a form of proportional representation, the additional member or mixed member system, rather than the first past the post system used at Westminster, which was meant to prevent any single party gaining an outright majority, but which in the event did not prevent the SNP winning an overall majority in 2011, making inevitable a referendum on Scotland's constitutional future. The Scottish Government, which was originally called the Scottish Executive **in a vain attempt to distinguish it from the UK Government**, is drawn from the Scottish Parliament, on the Westminster model, and accountable to it for the devolved governance of Scotland.¹⁰

Commented [t1]: Strange comment. Was it vain to attempt it? Or are you suggesting the attempt was unsuccessful?

Commented [AP2R1]: Standard English usage: see any dictionary definition of 'vain', but if it is thought to be unclear happy to replace with 'unsuccessful'

Limits

The Scottish Parliament has the power to make laws, "to be known as Acts of the Scottish Parliament".¹¹ In contrast to the 'sovereign' UK Parliament, however, its legislative competence is limited. Among the restrictions on its legislative competence, it has no power to legislate in relation to the matters reserved to Westminster by Schedule 5 to the Scotland Act.¹² As well as a number of general reservations, which include the constitution, defence and foreign affairs, these include a long list of specific reservations, ranging from fiscal, economic and monetary policy, with exceptions for devolved taxes and local taxes to fund

¹⁰ The re-branding of the Scottish Executive as the Scottish Government was given formal legal effect by the Scotland Act 2012, s 12.

¹¹ Scotland Act 1998 (SA 1998) s 28(1).

¹² SA 1998 s 29(2)(b).

local authority expenditure, to the regulation of activities in Antarctica.¹³ It also has no power to modify the enactments listed in Schedule 4 to the Act,¹⁴ which include the Human Rights Act 1998, the provisions of the European Communities Act 1972 which give effect to EU law in the UK, and the Scotland Act itself. It thus has no power to amend its constituent instrument. Nor does it have the power to legislate incompatibly with the European Convention on Human Rights (ECHR) or EU law.¹⁵ Should the Scottish Parliament legislate contrary to the ECHR, the courts have the power to strike down its legislation as ultra vires or unconstitutional. They are not confined to making a declaration of incompatibility as they would be in the case of an Act of the UK Parliament,¹⁶ which would then leave the Parliament to decide whether the offending legislation should be amended to bring it into line with the Convention.¹⁷

The Scottish Government is subject to essentially the same restrictions as the Scottish Parliament, save that it may take executive action, including make subordinate legislation, in relation to reserved matters where authorised to do so by or under a UK Act of Parliament.

Organisational v constitutional autonomy

Under the devolution settlement, Scotland enjoys a high degree of autonomy over its organisational arrangements. With the principal exception of criminal prosecutions, which are a matter for the Lord Advocate,¹⁸ the arrangements for the exercise of devolved functions are a matter for the Scottish Government and, to the extent that its approval is required, the Scottish Parliament. Scotland's constitutional arrangements - the principal institutions of

¹³ SA 1998 Sch 5 Pt III ss A1 and L7.

¹⁴ SA 1998 s 29(2)(c).

¹⁵ SA 1998 s 29(2)(d).

¹⁶ Human Rights Act 1998 (HRA 1998) s 4.

¹⁷ Under the Scotland Act 1998, s 102(1), the courts have the power to make an order removing or limiting the retrospective effect of a finding of invalidity, or suspending its effect in order to allow the defect to be corrected, but the making of such an order is at the court's discretion; see e.g. *Salvesen v Riddell* [2013] UKSC 22.

¹⁸ SA 1998 s 29(2)(e).

devolved governance and the relationships between them - by contrast, are beyond the reach of the Scottish Parliament. If they are to be altered it can only be by the Westminster Parliament, with the agreement of the Scottish Parliament under the Sewel convention. The Scottish Parliament itself has no power to alter them.¹⁹

The Scottish Government and Scottish Parliament have made extensive use of their powers over the organisation of devolved governance. At the level of central government, the departmental structure inherited from the former Scottish Office has been abolished as part of the adoption of an ‘outcomes based’ approach to government. Public bodies have undergone two waves of rationalisation, much of it involving “the amalgamation of bodies without substantive change in functions.”²⁰ The judicial system has been extensively revised.²¹ And in a move which led to widespread criticism of what were seen the centralising tendencies of the majority SNP government elected in 2011, Scotland’s eight regional police forces were merged to form a single national police force.²²

Local government

Scotland’s constitutional arrangements as prescribed by the Scotland Act do not include Scotland’s 32 local authorities. The Scottish Constitutional Convention, on whose recommendations the Scotland Act was based, wanted the devolution legislation to include a provision committing the Scottish Parliament to securing and maintaining a “strong and effective system of local government”, and to embody the principle of subsidiarity “so as to

¹⁹ It was a complaint under the Scotland Act as originally enacted that the Scottish Parliament was unable to appoint a temporary additional deputy presiding officer without asking Westminster to amend the Act. The Scotland Act 2012, s 4 empowered the Parliament appoint additional deputies, on the recommendation of the Calman Commission.

²⁰ Elvidge (n 4) 280.

²¹ Judiciary and Courts (Scotland) Act 2008; Courts Reform (Scotland) Act 2014.

²² Police and Fire Reform Scotland Act 2012; the criticism was given added force by the rationalisation of Scotland’s 32 colleges of further education to form 17 ‘college regions’ under the Post-16 Education (Scotland) Act 2013.

guarantee the important role of local government in service delivery.”²³ In the White Paper that preceded the Act, however, the Labour Government confined itself to saying that it did not expect the Scottish Parliament and its Executive “to accumulate a range of new functions at the centre which would be more appropriately and efficiently delivered by other bodies within Scotland”, adding that it believed that “the principle that decisions should be made as close as possible to the citizen holds good within Scotland as it does within the United Kingdom”.²⁴

Notwithstanding the lack of direct constitutional recognition, the status of local government has been recognised in various ways since devolution. The Accounts Commission, for example, has retained control of local authority audit - but not of health authority audit - in recognition of “the autonomy of local government as a separate democratically accountable tier of government”;²⁵ while the general restructuring power taken in the Public Services Reform (Scotland) Act 2010 may not be used to remove functions from local authorities or to make any structural change in relation to local government.²⁶ The removal of school education from local authority control, for example, which has sometimes been suggested as a means of reducing the dependence of local authorities on central government funding,²⁷ would thus require primary legislation.

Accountability

The Scottish Constitutional Convention expected the Parliament to provide through its practices and procedures “a form of government in whose accountability, accessibility,

²³ Scottish Constitutional Convention, *Scotland's Parliament, Scotland's Right* (1995) p 16.

²⁴ Scottish Office, *Scotland's Parliament* (Cm 3658, 1997) para 6.4.

²⁵ Scottish Office, *Principles of the Scottish Parliament's Financial Procedures: Final Report of the Financial Issues Advisory Group* (1999) para 6.41.

²⁶ Public Services Reform (Scotland) Act 2010, s 14(5).

²⁷ Elvidge (n 4) 283.

openness and responsiveness the people of Scotland will have confidence and pride.”²⁸

Accountability was not conceived solely in terms of parliamentary (or judicial) accountability, but the Parliament was expected to play a prominent part in holding the Scottish Executive to account. The Consultative Steering Group (CSG), which was set up by the Secretary of State for Scotland to recommend the procedures the Parliament might be invited to adopt, was thus “careful” to develop procedures designed to ensure that the Scottish Executive was “fully accountable” to the Scottish Parliament for its actions.²⁹ Recommending the CSG principles to the Parliament, Henry McLeish, the former chair of the CSG, claimed that the Scottish Executive would be “much more accountable to the Parliament in Scotland than the Government is to the Parliament in Westminster.”³⁰

At the heart of the Parliament’s procedures are its committees, which combine the roles of select and public bill (formerly standing committees) at Westminster, the idea being to enable MSPs to develop expertise in particular areas and to bring an informed view to the consideration of legislation and the scrutiny of government. Almost from the outset, however, the Parliament’s committees struggled to match the expectations held of them. In the first two sessions (1999-2007), lack of time together with the breadth of their remits made it difficult for some committees to cover the ground, with the demands of legislative scrutiny in particular reducing the scope for some committees to undertake their own inquiries.³¹ The slackening of the legislative pace in the third session (2007-2011), however, when a minority SNP government was in power, was not accompanied by any noticeable increase in scrutiny, the political focus by then having shifted to the chamber, and Labour and Liberal Democrat

²⁸ *Scotland’s Parliament, Scotland’s Right* (n 22) p 24.

²⁹ Scottish Office, *Shaping Scotland’s Parliament: Report of the Consultative Steering Group on the Scottish Parliament* (December 1998) section 2, para 25 and section 3.4, para 1; accountability was one of the key principles on which the CSG’s proposals were based: “the Scottish Executive should be accountable to the Scottish Parliament, and the Parliament and the Executive should be accountable to the people of Scotland”.

³⁰ Scottish Parliament Official Report 9 June 1999, col 367.

³¹ In its Session 2 legacy paper, the Conveners Group singled out the difficulty in achieving a balance between legislative scrutiny and other essential scrutiny work as one of the most significant issues faced by committees in that session: Conveners Group Legacy Paper, 2nd Session (February 2007) para 4.

MSPs being at the same time reluctant to revisit their own record by way of post-legislative scrutiny. The sometimes rapid turnover of members also meant that committees did not build up the expertise anticipated.

Faced with an avalanche of criticism at the end of its third session,³² the Parliament embarked on what was billed as a “thorough MoT” of its performance.³³ Question time was adjusted to increase the opportunity for more topical questions, and committee conveners were said by the Parliament’s Presiding Officer to have “enthusiastically endorsed a reform agenda that should enable parliamentary committees to increase their agility, responsiveness and focus”.³⁴ After three years, however, and with the referendum imminent, the Conveners Group’s “programme for change” seemed to be more about securing favourable publicity for the work of committees than improving their effectiveness in holding government to account.

The courts, as we have seen, occupy a powerful position in the devolved constitution. Should the Parliament exceed the limits on its competence, they have the power to strike down its legislation as unconstitutional, a power they do not possess in relation to UK Acts of Parliament, being confined to making a declaration of incompatibility with Convention rights or, in the case of incompatibility with EU law, to denying effect to the offending legislation. Without this power the only check on the Parliament’s potential for “arbitrary and oppressive action”³⁵ would have been political – in the form of UK ministerial intervention – which would have been a recipe for intergovernmental conflict as well as affording individuals no

³² See e.g. “Lord Foulkes attacks ‘pathetic’ Scottish Parliament”, *Telegraph* 21 September 2010; Jackson Carlaw, “It’s time to realise the potential of the Scottish Parliament” (October 2010); Jack McConnell, “Why the ‘pedestrian’ Scottish Parliament needs overhauling” *Telegraph* 24 November 2010; “Holyrood’s ‘three wise men’ back parliament overhaul” *Telegraph* 24 November 2010; “Veteran MSP in call for shake-up of Parliament” *Herald* 23 May 2011; Bruce Crawford, “All parties need to help change Holyrood” *Scotland on Sunday* 12 June 2011.

³³ Standards, Procedures and Public Appointments Committee 2nd Report, 2011, *Reform of Parliamentary business inquiry Phase 1 Report: remodelling the Parliamentary week* (SPP 57) para 6.

³⁴ Letter from the Presiding Officer to all members, 8 July 2011.

³⁵ Terence Daintith, “*The Kilbrandon Report: Some Comments*”, in Harry Calvert (ed), *Devolution* (Professional Books 1975) 31.

guarantee of effective redress. Despite its novelty, constitutional review of legislation has not so far proved controversial. There have been only two cases in which the courts have struck down a provision of an Act of the Scottish Parliament, in both cases on grounds of incompatibility with Convention rights, rather than reserved matters grounds, and neither provoked an outcry.³⁶ Where controversy did arise, it was between the Scottish Government and the UK Supreme Court, led by its Scottish members, rather than between the Scottish Government and the Scottish courts, over the implications of the ECHR for the Scottish criminal justice system, leading to the restriction of the Supreme Court's recently acquired jurisdiction in Scottish criminal cases by the Scotland Act 2012.³⁷

The referendum debate

Scotland's written constitution

In a speech to the Foreign Press Association in London on 16 January 2013, a date apparently chosen because it was the anniversary of the approval of the Articles of Union by the Scottish Parliament in 1707,³⁸ the First Minister announced that one of the “first, most fundamental and exciting tasks” of the first independent Scottish parliament elected in May 2016 would be “to establish the process for Scotland's first written constitution through a constitutional convention.” The description of the constitution as a “written” constitution was at first glance curious, given that a constitution prepared by a constitutional convention would by its very nature be a written constitution – a work of “conscious art” rather than the result of “natural growth”.³⁹ The contrast, however, was with the UK's - and hence Scotland's - ‘unwritten’ constitution, which represented, in the First Minister's view, a “democratic deficit” an

³⁶ *Cameron v Cottam* [2012] HCJAC 31; *Salvesen v Riddell* [2013] UKSC 22.

³⁷ The story is recounted in Alan Page, *Constitutional Law of Scotland* (W Green 2015) paras 9-15- 9-23.

³⁸ Union with England Act 1707 (c 7).

³⁹ Leslie Wolf-Philips, *Comparative Constitutions* (Macmillan 1972) 32.

independent Scotland should not repeat.⁴⁰ The SNP government was “just one voice in the process”, but among the measures that might be included in a written constitution were constitutional rights to education and vital social services, a constitutional ban on the possession of nuclear weapons, and parliamentary and constitutional safeguards in respect of the use of Scotland’s armed forces.

The Scottish government’s views on what Scotland’s written constitution should include were set out more fully in the independence White Paper, *Scotland’s Future: Your Guide to an Independent Scotland*, which was published in November 2013. Among the provisions the Scottish government would propose for consideration by the constitutional convention were: equality of opportunity and entitlement to live free of discrimination and prejudice; entitlements to public services and to a standard of living that, as a minimum, secured dignity and self-respect and provided the opportunity for people to realise their full potential both as individuals and as members of wider society; protection of the environment and the sustainable use of Scotland’s natural resources to embed Scotland’s commitment to sustainable development and tackling climate change; a ban on nuclear weapons being based in Scotland; controls on the use of military force and a role for the Scottish Parliament in approving and monitoring its use; the existence and status of local government; rights in relation to healthcare, welfare and pensions; children’s rights; and rights concerning other social and economic matters, such as the right to education and a youth guarantee on employment, education or training.⁴¹

The constitutional platform

⁴⁰ Elvidge (n 4) 269 questioned the desirability of a written constitution, pointing out that, like the statutory framework for devolution, it would place the domestic courts in a more significant position within the overall governance structures than would otherwise be the case.

⁴¹ *Scotland’s Future* (n 5) p 353; see also Scottish Government, *Scotland’s Future: from the Referendum to Independence and a Written Constitution* (February 2013) para 1.10.

In his January speech to the Foreign Press Association, the First Minister announced that the “constitutional platform” for independence – “preserving continuity in key areas, but providing the first independent Scottish Parliament with the tools to make Scotland a better place” - would be established before the next Scottish Parliament elections in May 2016. Like the referendum itself, the Scottish government’s intention was that the constitutional platform – or the leading part of it - should be “made in Scotland”.⁴² Under it the Scottish Parliament would have the power to declare “independent statehood for Scotland in the name of the sovereign people of Scotland”; bring Scotland fully into the European mainstream on the protection of human rights by giving the ECHR the same legal force for reserved matters as it already had for devolved matters; provide for the continuity of the monarchy in Scotland; provide for a transparent and democratic system for ratification of treaties; provide for continuity of laws; define entitlement to Scottish citizenship; provide for the Supreme Court of Scotland; and place on the Scottish Parliament a duty to establish a constitutional convention to prepare the written constitution.⁴³ The constitutional platform - or that part of it that would have been made in Scotland - was published for consultation three months before the referendum in the form of a draft Scottish Independence Bill.⁴⁴ Together with a “refreshed” Scotland Act, the Bill once enacted would have constituted the founding legislation of an independent Scotland.

The Scottish Independence Bill

The Scottish Independence Bill, published in June 2014, was framed in terms of “higher-level principles and values” with the technical detail being relegated to the refreshed Scotland Act, a summary of which was provided in the consultation document on the draft Scottish Independence Bill. The Bill had been drafted to be “accessible, straightforward and concise”,

⁴² *Scotland’s Future: from the Referendum to Independence* (n 41) paras 2.12-2.13.

⁴³ *Scotland’s Future* (n 5) pp 338-340.

⁴⁴ *The Scottish Independence Bill* (n 5).

in the hope that this would enable the people of Scotland to see clearly the “most important principles, rights and structures of government” on which the SNP government believed an independent democratic Scotland should be founded.⁴⁵ Foremost among those principles was the ‘sovereignty of the people of Scotland’ – “In Scotland, the people are sovereign”⁴⁶ - which would replace the sovereignty of the Westminster Parliament as “the predominant constitutional principle in an independent Scotland.”⁴⁷

Under the “interim constitution”, set out in Part 2 of the Bill, the constitutional arrangements of the new state would remain essentially unchanged. “Scotland already ha[d] many of the institutions that a modern independent state required: a parliament elected by the people, a government accountable to the parliament, an impartial civil service, an independent judiciary and an autonomous legal system. These institutions [would] continue on independence, underpinned by new constitutional arrangements reflecting Scotland’s new constitutional status”.⁴⁸ The Scottish Parliament and Scottish Government would thus “continue and assume full powers and responsibility as the Parliament and Government of an independent State, while the High Court of Justiciary and the Court of Session in their appellate capacities would together become Scotland’s Supreme Court. The jurisdiction of the UK Supreme Court in Scotland would cease.”⁴⁹

The revised Scotland Act

As for the technical detail, the Scotland Act would be “refreshed and re-written” so that it could function effectively in the context of an independent Scotland.⁵⁰ Several provisions would be repealed as no longer relevant to an independent state, including section 28(7),

⁴⁵ *The Scottish Independence Bill* (n 5) Foreword.

⁴⁶ *The Scottish Independence Bill* (n 5) s 2.

⁴⁷ *The Scottish Independence Bill* (n 5) p 27.

⁴⁸ *Scotland’s Future* (n 5) p 354.

⁴⁹ *The Scottish Independence Bill* (n 5) p 34.

⁵⁰ *The Scottish Independence Bill* (n 5) p 50.

which provides that the Scottish Parliament's power to make laws for Scotland "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland", and Schedule 5 which sets out the reserved matters on which the Scottish Parliament cannot legislate. Others would be amended in the light of independence with references to the Prime Minister and the UK Supreme Court, for example, being removed. Many provisions, however would be retained, including the electoral system for the Scottish Parliament. The current franchise would also continue except that, as in the referendum, it would be extended to include 16 and 17 year olds.⁵¹

Limits

The sovereignty of the people of Scotland was an obvious starting point for the interim constitution, given its historical resonance, real or imagined,⁵² and the contrast frequently drawn between it and the unlimited sovereignty of the Westminster Parliament, which Lord Cooper had famously described in *MacCormick v Lord Advocate*⁵³ as a "distinctively English principle which has no counterpart in Scottish constitutional law." A Scottish Parliament, however, needs limiting as much as any other.⁵⁴ Under the interim constitution the Scottish Parliament (and Scottish Government) would have continued to be bound by EU law and the ECHR.⁵⁵ The Scottish Parliament, however, would not have been bound by the interim constitution: the SNP government rejected the "rigidity" of hard entrenchment or a special amending formula as not appropriate for what were intended to be temporary arrangements.⁵⁶ Although, according to the independence White Paper, the founding legislation of an independent Scotland would not be subject to "significant alteration" pending the preparation

⁵¹ A change now made by the Scottish Elections (Reduction of Voting Age) Act 2015.

⁵² *The Scottish Independence Bill* (n 5) p 27; for a sceptical view of the "ancient Scottish constitutional tradition", see Page (n 37) para 1-02 and references cited therein.

⁵³ *MacCormick v Lord Advocate* 1953 SC 396, 411.

⁵⁴ Bernard Crick and David Millar, *To Make the Parliament of Scotland a Model for Democracy* (John Wheatley Centre 1995) p 7.

⁵⁵ *The Scottish Independence Bill* (n 5) ss 24, 26.

⁵⁶ *The Scottish Independence Bill* (n 5) p 63.

of a permanent constitution by the constitutional convention,⁵⁷ it would thus have been open to a future Scottish Government to amend the interim constitution by ordinary process of legislation until such time as it was replaced by the written constitution - at which point it would depend on what the written constitution provided. The courts meanwhile would have had the power to declare future legislation invalid if it was incompatible with EU law or the ECHR, but not if it was contrary to the Scottish Independence Act or renewed Scotland Act.⁵⁸

The interim constitution also included, in line with the SNP government's views on what the written constitution should provide, a series of broad brush obligations and entitlements – in respect of nuclear disarmament, equality, children's wellbeing, the needs of island communities, the environment, and the use of Scotland's natural resources.⁵⁹ It would have been left to the courts to decide to what extent these were judicially enforceable, whether alone or in combination with other requirements. In some cases, e.g. nuclear disarmament, the view almost certainly would have been that the obligation to pursue negotiations with a view to securing nuclear disarmament, and the safe and expeditious removal from the territory of Scotland of nuclear weapons based there, was one for which ministers were answerable to the Parliament rather than the courts. It was only where legislation was incompatible with EU law or the ECHR that the courts would have had the power to declare it invalid.⁶⁰

Restructuring the Scottish state

In terms of the organisation of government, a future SNP government would retain the unified structure of central government adopted in 2007, which, it was said, had been “successful in delivering joined-up thinking and co-operation and provide[d] a firm basis for

⁵⁷ *Scotland's Future* (n 5) p 341.

⁵⁸ *The Scottish Independence Bill* (n 5) p 63.

⁵⁹ *The Scottish Independence Bill* (n 5) ss 23 and 28-32.

⁶⁰ *The Scottish Independence Bill* (n 5) p 63.

taking on the full range of policy and functions of an independent national government.”⁶¹ A number of new bodies would be required, including a welfare agency, an expanded tax collection agency, a debt management agency, a security and intelligence agency, a Scottish defence headquarters, a Scottish Civil Service Commission, a Scottish Passport Agency, and a Scottish Border and Migration Service, amongst others.⁶² The majority of transferred functions, however, would be absorbed by existing bodies or else continued on a shared basis, “where it makes sense to do so, and where it is in the interests of both Scotland and the rest of the UK”,⁶³ prompting the UK government to point out that the UK did not share public services, tax administration, pensions systems, or its currency arrangements with any other states, and that there were no states in existence that provided their neighbours with shared access to their public institutions on the scale the SNP government was promising on behalf of the continuing UK.⁶⁴ The UK government, however, scored something of an own goal with its claim that the costs of setting up new institutions could be as high as £2.7 billion ⁶⁵ - a figure arrived at by taking the estimated cost of setting up a UK central government department and multiplying it by the number of new bodies required regardless of the scale of their responsibilities. But if £2.7 billion was too high, the SNP government’s estimate of £200 million was almost certainly too low.

Local government

Under the interim constitution there would also “continue to be local government in Scotland”.⁶⁶ Local government would thus achieve the constitutional status it had been denied under the devolution settlement, although its powers and responsibilities would

⁶¹ *Scotland’s Future* (n 5) p 362.

⁶² *Scotland’s Future* (n 5) p 362-364.

⁶³ *Scotland’s Future* (n 5) p 364.

⁶⁴ *United Kingdom, united future: Conclusions of the Scotland analysis programme* (Cm 8869 2014) para 1.15.

⁶⁵ Cm 8854 (n 2) para 2.4 Box 2.B.

⁶⁶ *The Scottish Independence Bill* (n 5) s 17.

continue to be a matter for the Scottish Parliament. A future SNP government would also argue for the status and rights of elected local governments to be recognised in the written constitution.⁶⁷ This would enable Scotland to fully implement the European Charter of Local Self-Government, which provides that the principle of local self-government shall be recognised in domestic legislation, and, where practicable, in the constitution. In the absence of a written constitution, the SNP government argued that it would be impossible to provide this degree of constitutional recognition to local government, but there is nothing in the Scotland Act to prevent the entrenchment of local government in the constitutional arrangements of the devolved Scotland should that be thought desirable.

Accountability

In terms of the accountability of government, the interim constitution would make it explicit that the Scottish Government was accountable to the Scottish Parliament, and the Scottish Parliament to the people of Scotland.⁶⁸ The principle was said to be implicit within existing arrangements - when in fact it had been explicit from the outset⁶⁹ - but the SNP government believed that one of the advantages of moving to a written constitution was that such “basic and fundamental democratic principles can, and should be, expressly stated.”⁷⁰

Accountability, it acknowledged, had been identified by the Consultative Steering Group as one of the key principles on which the operational needs and working methods of the Scottish Parliament should be based, and it was appropriate this should be reflected in the constitution.⁷¹

Commented [TM3]: I am not sure I follow this. Are you suggesting that under the Scotland Act the SP could achieve legal entrenchment, i.e. disable itself from repealing legislation on local government.

Commented [AP4R3]: What is there to prevent it from laying down a special procedure, e.g. a two-thirds majority on the model of the Scotland Bill cl 10, for the reform of the system of local government?

⁶⁷ *Scotland's Future* (n 5) p 368.

⁶⁸ *The Scottish Independence Bill* (n 5) s 12.

⁶⁹ *Shaping Scotland's Parliament* (n 29).

⁷⁰ *The Scottish Independence Bill* (n 5) p 33.

⁷¹ *The Scottish Independence Bill* (n 5) p 33.

There was no mention of the criticisms of the Parliament's performance in holding government to account, which on the contrary "had set an example within the UK on how a modern legislature should operate. In line with its founding principles of power sharing, accountability, access and participation, and equal opportunity, the Parliament had successfully put into practice the principles on which it was founded".⁷² The debate itself, however, did little to allay fears of a 'one party state', with protests by the minority in the run up to the referendum that the SNP government was using its majority to close down inquiries and to edit out criticisms of government policy.⁷³

Under the interim constitution, as we have seen, the courts would retain the power to strike down Acts of the Scottish Parliament which were inconsistent with EU law or incompatible with the ECHR.⁷⁴ There would be no Scottish equivalent of the declaration of incompatibility procedure under the Human Rights Act for Scottish Parliament legislation in the former reserved areas, which the SNP government argued would "bring Scotland fully into the European mainstream on the protection of human rights by giving the [ECHR] the same legal force on reserved matters as it already has for devolved matters".⁷⁵ European mainstream or not, it would have been open to the Scottish Parliament to set aside a judicial decision that was not to its liking in the absence of any form of entrenchment of the interim constitution. The Scottish Parliament would thus have escaped, even if only temporarily, the confines of the devolution settlement, leaving a majority Scottish government in effectively the same position as a majority UK government under the UK's unwritten constitution - a curious

⁷² *Scotland's Future* (n 5) p 355.

⁷³ See e.g. Public Audit Committee 3rd Report, 2014, *Police Reform* (SPP 496); Finance Committee 5th Report, 2014, *Appointments to the Scottish Fiscal Commission* (SPP 558); European and External Relations Committee 2nd Report, 2014, *Report on the Scottish Government's proposals for an independent Scotland: Membership of the European Union* (SPP 530).

⁷⁴ *The Scottish Independence Bill* (n 5) ss 24, 26.

⁷⁵ *Scotland's Future* (n 5) p 340.

outcome, even if only a temporary one, for a process that took as its starting point the “outdated and profoundly undemocratic Westminster system”.⁷⁶

After the referendum

The Smith Commission

There was only one question on the ballot paper for the independence referendum on 18 September: “Should Scotland be an independent country?” As part of the negotiations over the referendum, the SNP government had sought a second question on further powers for the Scottish Parliament, but the UK government was adamant that only once the question of Scotland’s future within the United Kingdom had been settled could there be any consideration of further devolution. With a UK general election set to take place in May 2015, the assumption was that work on further powers in the event of a No vote would only begin after the UK general election, by which time the countdown to the Scottish Parliament elections in May 2016 would already have begun. In the final days of the referendum campaign, however, with the polls suddenly narrowing, the leaders of the three main political parties at Westminster “vowed” to deliver “extensive new powers” for the Parliament “by the process and according to the timetable announced by our three parties, starting on 19 September”,⁷⁷ a vow widely regarded, rightly or wrongly, as having sealed victory for the No campaign.

On the morning of 19 September, once the results of the referendum had become clear, the Prime Minister announced that Lord Smith of Kelvin had agreed to oversee a set of cross-party talks with the purpose of agreeing a package of new powers to be devolved to the

⁷⁶ Alex Salmond, speeches on 16 January 2013 (n 8) and 28 August 2013 (n 6).

⁷⁷ Daily Record, 16 September 2014.

Scottish Parliament. By its terms of reference, which were published on 23 September, the Commission was required to:

“convene cross-party talks and facilitate an inclusive engagement process across Scotland to produce, by 30 November 2014, Heads of Agreement with recommendations for further devolution of powers to the Scottish Parliament. This process will be informed by a Command Paper to be published by 31 October and will result in the publication of draft clauses by 25 January. The recommendations will deliver more financial, welfare and taxation powers, strengthening the Scottish Parliament within the United Kingdom.”

The “Smith Commission Agreement”, which was published on 27 November,⁷⁸ followed by draft clauses on 22 January 2015,⁷⁹ forms the basis of the Scotland Bill currently before the Westminster Parliament.

The Scotland Bill

In terms of the governance of Scotland, the Bill’s significance is threefold. First, the Scottish Parliament and Scottish Government are both “recognised as a permanent part of the United Kingdom’s constitutional arrangements,”⁸⁰ according them the same “in all time coming” status as was accorded the Court of Session by the Acts of Union three centuries before.⁸¹ Constitutional theorists will doubtless continue to argue that Westminster retains the power to abolish the Scottish Parliament, but the political reality, which the Bill reflects, is that the Scottish Parliament and Scottish Government *are* part of the United Kingdom’s constitutional

⁷⁸ Report of the Smith Commission for further devolution of powers to the Scottish Parliament (November 2014).

⁷⁹ *Scotland in the United Kingdom: an Enduring Settlement* (Cm 8890 2015).

⁸⁰ Scotland Bill cl 1, inserting new ss 1(1A) and 44(1A) in Scotland Act 1998.

⁸¹ Union with England Act 1707, art XIX; Union with Scotland Act 1706, art XIX.

arrangements, and will continue to be so for so long as Scotland remains part of the United Kingdom.

Second, it is also recognised that the Parliament of the United Kingdom “will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament”.⁸² This provision gives statutory backing to the ‘Sewel convention’, which as set out in the Memorandum of Understanding that governs relations between the UK government and devolved administrations, provides that “the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the consent of the devolved legislature.”⁸³ As applied in practice, the convention extends to Westminster legislation altering the Scottish Parliament’s legislative competence and the executive competence of the Scottish Ministers, as well as with regard to devolved matters. Were such changes to be made by order under the Scotland Act the consent of the Scottish Parliament would be required. Their inclusion within the scope of the convention thus ensures the need for the Parliament’s consent regardless of whether they are made by primary or secondary legislation. At the time of writing it remains to be seen whether the clause will be amended so that it reflects the application of the convention in practice.

The repeal of section 28(7) of the Scotland Act, which affirms the continuing powers of the United Kingdom Parliament to make laws for Scotland, was not canvassed during the Smith Commission process, but the combined effect of these two provisions once enacted will be to set the seal on a federal or near federal relationship between Scotland and the rest of the United Kingdom, in which the ‘devolution’ settlement cannot be amended or legislation enacted with regard to devolved matters without the Scottish Parliament’s consent.

⁸² Scotland Bill cl 2, inserting new s 28(8) in Scotland Act 1998.

⁸³ *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive* (October 2013) para 14.

Third, although the focus of the Smith Commission process was on financial, welfare and taxation powers, the Scottish Parliament will also gain powers over “all matters relating to the arrangements and operations of the Scottish Parliament and Scottish Government, including powers over the overall number of MSPs or the number of constituency and list MSPs, and powers over the disqualification of MSPs from membership and the circumstances in which a sitting MSP can be removed”.⁸⁴ Scotland will thus gain a substantial measure of control over its institutional arrangements as prescribed by the Scotland Act. Acknowledging the risk that a future Scottish Government might seek to revise those arrangements to suit its own ends, Scottish Parliament legislation amending the franchise, the electoral system or the number of constituency and regional members for the Scottish Parliament will require to be passed by a two-thirds or ‘super’ majority of the Scottish Parliament.⁸⁵

These powers have attracted little in the way of discussion so far, but most interest is likely to centre on the possibility of their use to increase the number of MSPs, not least given the challenges the Parliament will face in terms of the scrutiny of government as a result of the further increase in its powers, following on from those conferred by the Scotland Act 2012. It must be open to question, however, whether an increase in the Parliament’s size is in the realm of practical politics. It is perhaps noteworthy in this respect that, in the consultation on the draft Scottish Independence Bill, the SNP government said that that it did not propose increasing the number of MSPs, which it considered “appropriate for a country of Scotland’s size”.⁸⁶

The other major candidate for reform is the Parliament’s electoral system, which the Arbuthnott Commission on Boundary Differences and Voting Systems recommended should

⁸⁴ (n 78) para 26; Scotland Bill cl 11, amending Scotland Act 1998, Sch 4, para 4.

⁸⁵ Scotland Bill cl 10, inserting new ss 31A and 32A in Scotland Act 1998.

⁸⁶ The Scottish Independence Bill (n 5) p 51.

be reviewed after the 2011 Scottish Parliament elections, a recommendation endorsed by the Calman Commission.⁸⁷ In the consultation on the draft Scottish Independence Bill, the SNP government also said that it did not propose altering the Parliament's electoral system.

The Human Rights Act

An early test of the federal character of the relationship between Scotland and the rest of the United Kingdom may arise as a result of the Conservative government's manifesto commitment to replace the Human Rights Act with a British Bill of Rights (which may have been included in its manifesto as a bargaining counter in negotiations with possible coalition partners rather than as a cast iron commitment which might have to be implemented).

Although it might be argued that the Act's replacement relates to reserved matters, and hence does not require the Scottish Parliament's legislative consent, it is difficult to imagine such a reform being taken forward without the Scottish Parliament's consent - as a matter of practical politics if not of constitutional convention.⁸⁸ As things stand, there seems little question either that the Scottish Parliament's consent would not be forthcoming, leaving the Conservative government, if it decides to go ahead, with an uncomfortable choice between legislating in breach of the convention, by then enshrined in statute, or else not repealing the Human Rights Act so far as Scotland is concerned.⁸⁹ If the Scotland Act 2012 is a reliable guide, the Conservative government will prefer to proceed by agreement rather than publicly test the limits to the Sewel convention.

Local government

⁸⁷ Commission on Boundary Differences and Voting Systems, *Putting Citizens First: Boundaries, Voting and Representation in Scotland* (January 2006) para 4.8; Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (June 2009) para 5.19.

⁸⁸ For the argument that the Scottish Parliament's consent would be required under the Sewel convention, see Iain Jamieson, 'HRA Watch: Reform, Repeal, Replace? The repeal of the Human Rights Act and the Sewel Convention in Scotland' U.K. Const. L. Blog (11th June 2015) (available at <http://ukconstitutionallaw.org>).

⁸⁹ Replacement of the Human Rights Act by itself would not alter the obligation on the Scottish Parliament and the Scottish Government to refrain from acting incompatibly with the Convention rights, which derives from the Scotland Act, ss 29, 53 and 57(2), rather than the Human Rights Act.

The Scotland Bill has no bearing on the position of local government, which remains a matter for the Scottish Parliament. Local government, however, made full use of the opportunity presented by the referendum debate to press the case for greater powers. In his foreword to the Smith Commission agreement, Lord Smith recorded “a strong desire to see the principle of devolution extended further with the transfer of powers from devolution to local communities.” Acknowledging that this was an issue that would require “significant further thought and discussion”, he welcomed “the enthusiasm of all parties for greater empowerment of our communities. The Scottish Government should work with the Parliament, civic Scotland and local authorities to set out ways in which local areas can benefit from the powers of the Scottish Parliament.”⁹⁰ Whether this recommendation will be acted upon, and if so in what form, remains to be seen. Shortly before the referendum, the Convention of Scottish Local Authorities’ Commission on Strengthening Local Democracy called for a fundamental review of the structure, boundaries, functions and democratic arrangements for all local governance in Scotland.⁹¹ Since the referendum the Scottish Government has appointed a Commission on Local Tax Reform to consider alternatives to the council tax system – the second review of local government finance since devolution – and published a consultation paper on greater autonomy for Scotland’s island areas by way of follow-up to the “prospectus” for island communities published during the referendum campaign.⁹²

Accountability

The further increase in its powers as a result of the Smith Commission process and the Scotland Bill represents a major challenge for the Scottish Parliament in terms of the scrutiny

⁹⁰ *Report of the Smith Commission* (n 78) Foreword.

⁹¹ Commission on Strengthening Local Democracy, *Effective Democracy, Reconnecting with Communities* (August 2014).

⁹² Island Areas Ministerial Working Group, *Empowering Scotland’s Island Communities* (June 2014); Scottish Government, *Consultation on provisions for a future Islands Bill* (September 2015).

of government. Lord Smith, who saw the Parliament's increased powers as "demanding" improvements in parliamentary scrutiny, recommended that the Parliament's Presiding Officer continue to build on her work on parliamentary reform by undertaking an "inclusive review" that would produce recommendations to run along alongside the transfer of additional powers.⁹³ In October 2014 the Presiding Officer asked the Standards, Procedures and Public Appointments Committee to consider whether committee conveners should be elected by the whole Parliament on the model of the House of Commons. In its Session 3 legacy paper, the Conveners Group had noted the growth of "assertive" parliamentary committees over the last thirty years at Westminster, and recommended that the Standards, Procedures and Public Appointments Committee consider introducing a system of election of committee members and conveners.⁹⁴ The Standards, Procedures and Public Appointments Committee noted that elected chairs seemed to have enhanced the status and authority of committees in the House of Commons, but was not persuaded that the election of conveners was the right starting point for reform of the Parliament's committee system. "Instead there should be a focused and practical discussion about the steps needed to strengthen committees' ability to scrutinise legislation and policy and hold the government to account."⁹⁵ The Committee agreed therefore to undertake an inquiry into the operation of committees with a view to enabling the Parliament to decide what changes are needed before the end of the current session in March 2016.

Conclusion

The Scottish Parliament was not just about the "the sovereign right of the Scottish people to determine the form of government best suited to their needs." It was also about the subjection

⁹³ *Report of the Smith Commission* (n 78) Foreword.

⁹⁴ Conveners Group Legacy Paper – Session 3 (2011) paras 7-9.

⁹⁵ Standards, Procedures and Public Appointments Committee 6th Report, 2015, *Elected Conveners* (SPP 767) para 27

of the government of Scotland to democratic scrutiny and control, a theme which runs through Scotland's constitutional history from the criticisms levelled at that "Pooh Bah, the Secretary of State for Scotland" in the 1920s, to the Claim of Right adopted at the inaugural meeting of the Scottish Constitutional Convention in 1989. Reflecting on the referendum debate, however, it is difficult to avoid the conclusion that it was more about powers than accountability and control – the tools the Scottish Parliament needed to make Scotland a better place than the governance of Scotland. The Yes campaign's answer to the governance question amounted to little more than its repeated insistence upon the need to "eliminate the democratic deficit", be it in the form of governments Scotland did not vote for or the UK's unwritten constitution.⁹⁶ It was an issue the No campaign chose not to address, mindful no doubt of the risk of being seen to 'talk down' Scotland. The more extensive the Parliament's powers, however, the more demanding of a fuller answer the question of governance will become. Whether the inquiry currently being conducted by the Standards, Procedures and Public Appointments Committee will provide the beginnings of that answer remains to be seen.⁹⁷

⁹⁶ *Scotland's Future* (n 5) p 41.

⁹⁷ There is less obvious unwillingness to acknowledge that scrutiny is an issue than was apparent during the referendum campaign, but little in the way of clear ideas on how to tackle it, short of increasing the number of MSPs, which is widely regarded as not practical politics.